104

(2)

Supreme Court, U.S.
FILED

08-151 AUG 4 - 2008

OFFICE OF THE CLERK

No. 08-____

In the Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

CITIZENS FOR TAX REFORM, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX

WILLIAM P. MARSHALL
6 Heather Court
Chapel Hill, NC 27517

Special Counsel for the
Attorney General of Ohio

NANCY H. ROGERS
Attorney General of Ohio

BENJAMIN C. MIZER*
Solicitor General
**Counsel of Record*
MICHAEL DOMINIC MEUTI
KIMBERLY A. OLSON
Deputy Solicitors
SHARON A. JENNINGS
Assistant Solicitor
30 East Broad St., 17th Fl.
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Petitioner
State of Ohio

TABLE OF CONTENTS

Page

Appendix A: Opinion, United States Court of Appeals for the Sixth Circuit, March 5, 2008 ..... 1a

Appendix B: Order, United States District Court for the Southern District of Ohio, Western Division, November 27, 2006 ..... 28a

Appendix C: Temporary Restraining Order, United States District Court for the Southern District of Ohio, Western Division, April 19, 2005 ..... 50a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206

File Name: 08a0104p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CITIZENS FOR TAX REFORM and JEFFREY P. LEDBETTER,
Plaintiffs-Appellees,

v.

JOSEPH DETERS et al.,
Defendants,

STATE OF OHIO,
Intervenor Defendant-Appellant.

No. 07-3031

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 05-00212—Susan J. Dlott, District Judge.

Argued: November 30, 2007

Decided and Filed: March 5, 2008

Before: SILER, GIBBONS, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: William P. Marshall, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellant. David R. Langdon, LANGDON & HARTMAN, Cincinnati, Ohio, for Appellees. **ON BRIEF**: William P. Marshall, Sharon A. Jennings, OFFICE OF THE ATTORNEY GENERAL OF OHIO, Columbus, Ohio, for Appellant. David R. Langdon, Curt C. Hartman, LANGDON & HARTMAN, Cincinnati, Ohio, for Appellees. Todd P. Graves, GRAVES, BARTLE & MARCUS, Kansas City, Missouri, for Amicus Curiae.

OPINION

McKEAGUE, Circuit Judge. As with the law in general,[1] the First Amendment is a jealous mistress. It enables the people to exchange ideas (popular and unpopular alike), to assemble with the hope of changing minds, and to alter or preserve how we govern ourselves. But in return, it demands that sometimes seemingly reasonable measures enacted by our governments give way.

The State of Ohio enacted a provision making it a felony to pay anyone for gathering signatures on election-related petitions on any basis other than the time worked. It did so for the sensible purpose of reducing fraudulent signatures. The provision, however, runs afoul of the First Amendment because

---

[1] *See* Joseph Story, *Inaugural Address as Dane Professor of Law at Harvard University, on the Subject of the Value & Importance of Legal Studies* (Aug. 5, 1829).

it creates a significant burden on a core political speech right that is not narrowly tailored. Accordingly, we affirm the district court's grant of summary judgment against the State.

I

The district court set forth the background of this case:

Ohio Revised Code ("O.R.C.") § 3599.111 ("the Statute") states in relevant part as follows:

> (B) No person shall receive compensation on a fee per signature or fee per volume basis for circulating any declaration of candidacy, nominating petition, initiative petition, referendum petition, recall petition, or any other election-related petition that is filed with or transmitted to a board of elections, the office of the secretary of state, or other appropriate public office.
>
> * * *
>
> (D) No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked.

Plaintiffs Citizens for Tax Reform ("CTR") and Jeffrey P. Ledbetter, a former Treasurer of CTR,[2] filed a Verified Complaint on April 1, 2005

---

[2] Collectively referred to herein as "CTR."

challenging the constitutionality of the O.R.C. § 3599.111 on the grounds that the prohibition of payment to petition circulators on a per-signature or per-volume basis violated their core political speech rights. (Doc. 1.) Plaintiffs named as defendants Joseph T. Deters, the Hamilton County, Ohio prosecutor, and Mathias H. Heck, Jr., the Montgomery County, Ohio prosecutor, both in their official capacities only, as persons responsible for the enforcement of the Statute. (*Id.*)

Prior to the effective date of the Statute, CTR had engaged a political consulting firm on the basis of a fixed fee contract to secure the necessary signatures to qualify a proposed constitutional amendment for the November 2005 Ohio general election. Pursuant to the contract, CTR was to pay the firm $1.70 per signature for a total of approximately 450,000 signatures. After the Statute became effective, CTR was not permitted to pay circulators on a per-signature or on any per-volume basis. The political consulting firm was no longer willing to collect signatures pursuant to the agreed-upon fixed-fee contract and it estimated that the cost for gathering the signatures would increase by more than $300,000. Plaintiffs asserted that the Statute increased the cost of qualifying their proposed amendment, made it more difficult to raise money necessary to fund the initiative effort, and that they had refrained from attempting to qualify the proposed amendment for the ballot so long as the Statute was in force. (*Id.*)

The Ohio Attorney General moved to intervene as a defendant in this action on March 11, 2005 in order to defend the constitutionality of § 3599.111 and the Court issued a Notation Order

permitting the intervention on March 12, 2005. (Doc. 7.)

On March 19, 2005, Chief Judge Sandra Beckwith issued a Temporary Restraining Order enjoining the enforcement of O.R.C. § 3599.111. (Doc. 16.) Chief Judge Beckwith found that Plaintiffs "have introduced actual evidence that tends to show that the restriction on payment of petition circulators on a per-signature basis limits their ability to retain effective circulators and reduces the likelihood that they will succeed in placing their initiative on the November 2005 ballot." (*Id.* at 9.) She further found that the State of Ohio did not adduce evidence of the necessity of the law to prevent fraud. She stated that the State's evidence that fraud occurred when circulators were paid on a per-signature basis in Ohio was not sufficient to establish that the per-signature basis was cause of or an incentive to the fraud. (*Id.*) The State had not proven "that compensation on a per-signature basis generates fraud at a greater rate than other forms of compensation." (*Id.*)

On May 4, 2005, March 22, 2006, and April 16, 2006, the Court issued Agreed Orders extending the temporary restraining order until October 15, 2005, extending it to cover the amendments to the law that took effect on May 2, 2005, and extending it pending a final disposition in this case. (Docs. 20, 42, 46.)

Citizens for Tax Reform v. Deters, 462 F. Supp. 2d 827, 828-30 (S.D. Ohio 2006) ("*CTR*") (footnotes in original omitted).

Deters and Heck moved for summary judgment based on the intervention in the case by

the State of Ohio. As CTR did not oppose the motion, the district court granted them summary judgment and dismissed them from the case. *Id.* at 830.

CTR and the State of Ohio filed cross motions for summary judgment. The State also filed a motion to dismiss based on mootness. The district court denied the State's motion to dismiss, concluding that the State had not proven that CTR had disbanded and, even if it had, CTR's case was saved from mootness under the exception for wrongs that are "capable of repetition, yet evading review." *Citizens for Tax Reform* v. Deters, No. 05-212, 2006 WL 3420242, at *1 (S.D. Ohio Nov. 27, 2006).

On the cross motions, the district court held that the Statute was unconstitutional. The district court found that CTR had established that the "Statute burdens their core political speech rights." *CTR*, 462 F. Supp. 2d at 832. Specifically, it agreed with a prior district court judge's issuance of a temporary restraining order in the case based on CTR's showing "that the Statute limits [its] ability to retain effective circulators and reduces the likelihood that petition proponents will be able to place their petitions on the ballot." *Id.* The State countered that the Statute was justified as a means to combat irregularities and fraud in the election process. The district court dismissed much of the State's evidence, however, as inconclusive or irrelevant. It concluded, "[W]hile the State of Ohio's evidence might show that fraud has occurred when the payment per-signature method is used, it has not isolated the form of payment as being the cause of or an incentive to wide spread petition signature fraud in Ohio." *Id.* at 838.

The State timely appealed the district court's denial of its motion for summary judgment.

II

A. Fed. R. Civ. P. 56

The court reviews de novo the district court's grant of summary judgment. *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 619 (6th Cir. 2006), *cert. denied*, 127 S. Ct. 2100 (2007). Summary judgment should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). To survive summary judgment, the non-movant must provide evidence beyond the pleadings "set[ting] out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

B. Balancing First Amendment Rights Against the Regulation of Elections

1. In General

The First Amendment to the U.S. Constitution reads in part, "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fourteenth Amendment extends these prohibitions against the States. *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). One of the main interests embodied in the First Amendment is that of a free, sovereign people using the power of persuasion, rather than force, to govern itself. Accordingly, the Supreme

Court has held that the First Amendment places a high value on the right to engage freely "in discussions concerning the need for [political] change," including change accomplished through petitions and elections. *Meyer v. Grant*, 486 U.S. 414, 421 (1988).

First Amendment rights to free speech, to assemble, and to petition the government are not, of course, without boundary. With respect to elections, Article I, Section 4 of the Constitution grants to States the authority to determine "The Times, Places and Manner of holding Elections." As the Supreme Court explained in T*immons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), "[I]t is . . . clear that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder," *id.* at 358 (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." (internal quotation marks omitted))). "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Buckley v. Am. Constitutional L. Found.*, 525 U.S. 182, 191 (1999) (citations omitted). When the boundaries of First Amendment rights push up against a State's authority to regulate elections, cases like the present one arise.

CTR asserts that Ohio's requirement that circulators be paid only on the basis of their time worked (the "per-time-only" requirement) places a severe burden on its First Amendment rights. The

State counters that the burden is not severe and, even if it is, the burden is justified by the need to counter election fraud. In Timmons, the Supreme Court set forth the following framework for resolving these types of competing interests:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

520 U.S. at 358-59 (internal quotation marks and citations omitted); *see also Buckley*, 525 U.S. at 192 ("We have several times said no litmus-paper test will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon no substitute for the hard judgments that must be made." (internal quotation marks omitted)).

2. Character and Magnitude of the Burden

a. Prior Decisions

The State of Ohio argues that its per-time-only requirement imposes, at most, only a moderate burden on CTR's rights. It faults CTR for failing to show, in the State's words, that the ban would cause "a significant, quantitative decrease in the number of circulators available" or that it "would decrease the number of issues successfully placed on the ballot." Appellant's Br. at 18. It asserts that we should apply a "less exacting review" and that, under this review, the requirement meets the standard for a "reasonable, nondiscriminatory restriction[]." *Timmons*, 520 U.S. at 358. CTR argues, on the other hand, that the cumulative effect of the Statute on the petition process severely burdens CTR's core political speech rights.

The Supreme Court first addressed the issue of payment to petition circulators in *Meyer v. Grant*. The State of Colorado had banned proponents of petitions from paying circulators, among other restrictions. The Court subjected Colorado's payment ban to "exacting scrutiny." *Meyer*, 486 U.S. at 420 (citations omitted). The Court determined that the ban restricted political expression in two fundamental ways: (1) it "limit[ed] the number of voices who will convey [the petitioner's] message and the hours they can speak and, therefore, limits the size of the audience they can reach"; and (2) "it makes it less likely that [the petitioner] will garner the number of signatures necessary to place the matter on the ballot, thus limiting [the petitioner's]

ability to make the matter the focus of the statewide discussion." *Id.* at 422-23.

The State of Colorado defended the measure in part by pointing out all of the other avenues of expression left open to petitioners. The Court rejected the argument, explaining that simply because more-burdensome avenues of speech existed did not mean that Colorado could simply shut down a less-burdensome one: "Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424. The Court concluded that the burden Colorado had to overcome to justify its ban was "well-nigh insurmountable." *Id.* at 425.

Several years later the State of Colorado was again before the Supreme Court to justify several new petition regulations. In *Buckley v. American Constitutional Law Foundation*, the Court looked at three provisions: "(1) the requirement that initiative-petition circulators be registered voters"; "(2) the requirement that they wear an identification badge"; and "(3) the requirement that proponents of an initiative report the names and addresses of all paid circulators and the amount paid to each circulator." 525 U.S. at 186. Using again the "exacting scrutiny" it applied in *Meyer*, *id.* at 204, the Court struck down all three as too heavy a burden in comparison to the State's purported justifications of deterring fraud and corruption, *id.* at 205.

Since the *Meyer* and *Buckley* decisions, three circuits have considered whether bans on per-signature payments meet constitutional muster. The Eighth Circuit was the first when it considered

North Dakota's ban in *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) ("*IRI*"). The court found the ban constitutional. It based its holding on the respective strengths of the proofs submitted:

> Examining the record in this case, we conclude that the State has produced sufficient evidence that the regulation is necessary to insure the integrity of the initiative process. In 1987, the Legislature passed § 16.1-01-12(11) in response to problems that occurred with an initiative that had been placed on the ballot in November 1986. State Representative Linderman stated, in regard to a 1986 signature campaign, that "students were being paid 25¢/signature. There were reported irregularities-taking names out of the phone book, etc." The limited legislative history available shows that the legislators were aware of, and contemplated, the bill's effect on the circulation of petitions, but that they were more concerned with the testimony they had heard regarding signature fraud.
>
> Furthermore, as mentioned in the previous section on the residency requirement, in 1994 approximately 17,000 petition signatures were invalidated. A subsequent investigation revealed that payment per signature was an issue in the 1994 incident.

> The appellants have produced no evidence that payment by the hour, rather than on commission, would in any way burden their ability to collect signatures. The appellants have only offered bare assertions on this point. While it may be argued that such assertions may establish an unacceptable burden on signature-gathering where the state cannot offer any evidence demonstrating the need to prohibit commission payments, *Cf. Meyer*, 486 U.S. at 424, 426, 108 S.Ct. 1886, when the state introduces evidence justifying the ban on commission payments as a necessary means to prevent fraud and abuse (as the state has in this case), initiative sponsors may not rest on bare assertions alone.

Id. at 618.

The Ninth Circuit addressed a similar per-signature ban passed by Oregon voters in *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006). After an abbreviated bench trial, the district court held that Oregon's ban did not unconstitutionally burden petitioners' core political speech rights. *Id.* at 953. The Ninth Circuit affirmed. After reviewing the standard set forth by the Supreme Court in Meyer and Buckley, the court distinguished Oregon's per-signature ban from the total ban on payments in *Meyer*. *Id.* at 962. It described Oregon's ban as simply "prohibit[ing] one method of payment." *Id.* It also read *Buckley* as modifying *Meyer*:

> To the extent *Meyer* may be read to indicate that any resulting decrease in the pool of available circulators is sufficient to constitute a "severe burden" under the First Amendment, in *Buckley* the Court refined its analysis and made clear that the *degree* of the decrease resulting from the measure is properly considered in determining the severity of the burden.

Id. at 962-63 (citation omitted, emphasis in original). The court found that the district court did not clearly err in rejecting the petitioner's evidence of circulators leaving or refusing to work in Oregon as "unsupported speculation." *Id.* at 964. The two primary affiants, William Arno of Arno Political Consultants ("APC") and Tracy Taylor of Taylor Petition Management, LLC, had little experience in Oregon, and thus could not offer a reliable estimate of the ban's effect on the cost of signature gathering in the state. *Id.* at 965. Likewise, their assertions regarding the effect the ban had on the validity rate of signatures carried little weight with the court. *Id.* at 966.

The court recognized that "from an economic perspective, eliminating one method of payment (but not every method, a la *Meyer*) for petition circulators could result in some barriers to entry in the signature procurement market." *Id.* at 967. Paying circulators by the signature "can be more productive of signatures than paying an hourly wage." *Id.* The court noted, however, that whether the measure actually created any barriers to entry was "a question of historical fact," and it did not find clear error with the district court's determination that no

such barriers existed. *Id.* Even had the petitioners made the requisite showing, the barriers would have established only a "lesser burden" under the First Amendment. *Id.* at 968. This is because Oregon's ban was "quite limited in its proscription, barring only payment of petition circulators on the basis of the number of signatures gathered. It does not prohibit adjusting salaries or paying bonuses according to validity rates or productivity . . . which could likely counter any barriers to entry." *Id.* Thus, concluding that the petitioners had established only a "lesser burden" on their rights, the court subjected the per-signature ban to a "less exacting review" and ultimately upheld the ban. *Id.*

Finally, the Second Circuit followed the Eighth and Ninth Circuits in rejecting a petitioner's claim that a per-signature ban violated the Constitution. In *Person v. New York State Board of Elections*, 467 F.3d 141 (2d Cir. 2006), the court joined its two sister circuits in "find[ing] the record presented to [it] provides insufficient support for a claim that the ban . . . is akin to the complete prohibition on paying petition circulators" as in *Meyer* "or that the alternative methods of payment it leaves available are insufficient," *id.* at 143 (citations omitted). The court concluded that the petitioner's argument that paying circulators on a per-signature basis was the best economic incentive was insufficient to show an unconstitutional burden "when balanced against the state's interest in preventing fraud in the gathering of signatures." *Id.*

Several guide posts can be gleaned from these Supreme Court and circuit court decisions regarding the character and magnitude of the burden created by Ohio's per-time-only requirement. First, the

question is fact-intensive, given the "sliding scale" analysis outlined by the Supreme Court in *Meyer*, *Buckley* and other decisions. *Lee v. Keith*, 463 F.3d 763, 768 (7th Cir. 2006) (describing the Supreme Court's flexible approach in similar First Amendment cases as a "sliding scale"). Bans on paying circulators, whether outright or partial, can impact political expression in at least three related but distinct ways: (1) a ban can reduce the number and hours of voices which will convey the message; (2) it can limit the size of the audience of the petition; and (3) it can lower the likelihood that a measure will qualify for the statewide ballot. A circulator plays a crucial role in the petition process because the circulator both has to express the petitioner's desire for political change and has to discuss the merits of the proposed change. Finally, although the availability of other payment methods might reduce the burden, the extent to which the more effective means are foreclosed is an important consideration.

b. Character and Magnitude of Ohio's Per-Time-Only Requirement

A review of the record evidence shows that Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive, primarily because of the inefficiencies inherent in a per-time-only system. The evidence also shows that so-called professional circulators would likely not work under a per-time-only system (or at least would choose a per-signature system if given the option). The evidence is mixed on how validity rates are affected. Moreover, CTR has not pointed to any evidence showing that, outside a relatively small number of professional circulators, there exists a substantial

number of people or a demonstrable percentage of Ohio's population who would participate under a per-signature system but not under a per-time-only system.

There is little dispute that operating under a per-time-only system will increase the costs of both proposing an initiative and qualifying it for the ballot. First, the ban eliminates the opportunity for a petitioner to enter into a fixed-price contract with a political consulting firm, signature coordinator, or circulator. Under a per-signature payment scheme, CTR can contract, for example, for 500,000 signatures at a fixed price of $1.50 per signature. The petitioner knows how much money it will need to raise at the outset to qualify its initiative. Under Ohio's per-time-only provision, however, the petitioner cannot enter into a fixed price contract to pay circulators per signature. O.R.C. § 3599.111. Moreover, § 3599.111 does not define the term "person." Section 1.59(C) of the Ohio criminal code states: "As used in any statute, . . . 'Person' includes an individual, corporation, business trust, estate, trust, partnership, and association." Thus, a petitioner is prohibited from paying a political consulting firm, signature coordinating firm, or any other business entity to gather a specific number of signatures for a fixed price. In other words, the ban works up and down the chain from petitioner to consulting firm to signature coordinating firm to circulator. Thus, the per-time-only provision adds an element of risk to the petition process which would otherwise be absent.

In addition to the increased risk, petitioners get fewer signatures for their money, according to CTR. Per-hour circulators are less efficient at

gathering signatures than are per-signature circulators. The cause for this drop in efficiency is hardly novel: basic economic theory instructs that a producer will seek to maximize the output for which she gets paid until the cost to her of producing another marginal unit equals the payment she receives for it. Under the per-time-only provision, the output for which the circulator is to get paid would not be signatures, but rather time worked. Thus, the circulator would have an incentive to work as many hours as possible up to the point the wage earned for the marginal unit of time equaled the marginal cost to her of working that unit of time. The circulator's primary focus would be on the amount of time worked, not the quality of work product produced.

CTR further asserts that the best, most professional coordinators and circulators are not interested in working under a per-time-only system. They purportedly can earn more money working on a per-signature basis than they can under any other system. Tracy Taylor testified that his top coordinators that qualified his last two Ohio issues refuse to go to Ohio on an hourly basis. This reluctance on the part of some professional coordinators and circulators also makes economic sense. If, for example, the professional circulators are more efficient than the average circulator in the sense that they can gather more valid signatures within a given unit of time, they will be financially better off working under a system that rewards them based on their efficiency, rather than a system which pays them based on something for which they do not have a comparative advantage, quantity of time worked.

According to CTR, the cumulative effect of the inefficiencies caused by a per-time-only system increases the amount of time it takes to collect signatures, further exacerbating the risk of unforeseen costs. As a result, CTR contends that it and other firms are not only less likely to qualify their proposed initiatives for the ballot, but are less likely even to try. The State counters by pointing to the relatively stable numbers of qualifying petitions in Oregon before and after it enacted its per-signature ban in 2002. The Oregon numbers suffer, however, from a similar defect in Colorado's experience that the Supreme Court pointed out in *Meyer*: the statistic "does not reject the possibility that even more petitions would have been successful if paid circulators had been available, or, more narrowly, that [petitioners] would have had greater success if they had been able to hire extra help." 486 U.S. at 418 n.3.

CTR has also presented evidence that circulators paid by the time worked yield lower validity rates than circulators paid by the signature. The evidence is limited, however, and inconclusive. For example, Michael Arno stated in a declaration that his company's validity rates dropped in all three of its petition drives it handled in Oregon after the per-signature ban went into effect in that state. Lee Albright, the owner of a petition management company, testified that his firm collected signatures for an initiative in Oregon after the ban. His firm ended up collecting twice the number of signatures needed to get the initiative on the ballot because he was afraid that the amateur petition circulators would collect too many invalid signatures. However, Ohio has submitted evidence from Oregon's Secretary of State that the average validity rate on

petitions actually increased from 69.63% in 2002 to 72.35% in 2004. At best, CTR has raised a question of fact whether validity rates are lower under a per-time-only scheme.

Finally, there is little in the record to suggest that a substantial number of people in Ohio would be dissuaded from participating in the petition process because of a ban on all payment not based on time worked. This is not a case like in *Buckley* where approximately 35% of the state's population was categorically prohibited from participating. 525 U.S. at 193-94 & n.15. Nor has CTR proffered, for example, a broad-based survey to show a demonstrable decrease in the pool of potential circulators.

Accordingly, a review of the record confirms that there is no genuine issue of material fact (1) that Ohio's per-time-only requirement would make proposing and qualifying initiatives more expensive; and (2) that professional coordinators and circulators would likely not work under a per-time-only system. As to the validity rates and the available statewide pool of circulators, however, the matters are at best issues of fact.

c. Where Does § 3599.111 Fit Along the Sliding Scale?

If the Supreme Court's decision in *Meyer* lies at one end of the spectrum and the *IRI*, *Prete* and *Person* decisions lie at the other, then this case falls somewhere in between. Ohio's partial ban on payment is not as draconian as the complete ban in *Meyer*. However, it has a couple of features that

distinguish it from those considered in the other circuit court decisions.

One difference between the present case and *IRI*, *Prete* and *Person* is that Ohio's ban is more restrictive. North Dakota, Oregon and New York all banned payments made on a per-signature basis; Ohio, on the other hand, has banned all remuneration to circulators except on a per-time basis. The difference is not academic. As the Ninth Circuit recognized in *Prete*, Oregon's ban on per-signature payments left open various other means of payment besides one based solely on the time worked:

> Allowable practices include: paying an hourly wage or salary, establishing either express or implied minimum signature requirements for circulators, terminating circulators who do not meet the productivity requirements, adjusting salaries prospectively relative to a circulator's productivity, and paying discretionary bonuses based on reliability, longevity and productivity, provided no payments are made on a per signature basis.

Prete, 438 F.3d at 952 n.1 (quoting Or. Admin. R. 165-014-0260); *see also Person*, 467 F.3d at 143 (noting that New York's statute "specifically prohibits only the per-signature payment to election workers"); *IRI*, 241 F.3d at 616 (reviewing North Dakota's provision which prohibits payment "on a basis related to the number of signatures obtained").

This is a significant distinction. Under a plain reading of § 3599.111, CTR (or its subcontractors) could not give a bonus to a circulator based on productivity or longevity. CTR could not set a minimum signature requirement because, in order to earn a day's wages, for example, a circulator would both have to work a certain number of hours and have to collect a certain number of signatures, thereby partially tying earnings to the number of signatures. Arguably, CTR could not terminate a circulator who consistently did not collect enough signatures because, again, to earn a wage (and keep the job) the circulator would, among other things, have to collect a minimum number of signatures. Furthermore, CTR could not base a circulator's earnings on the geographic area covered (pay per city block, for example). It is even unclear whether CTR could pay a salary to a circulator unless it strictly limited the hours worked. If, instead, a salaried circulator were responsible for completing a number of duties each day or week regardless of the number of hours worked (i.e., the typical plight of the salaried worker), then in a sense the circulator would be compensated on a basis other than strictly time worked. This added difficulty with motivating a workforce reinforces CTR's argument that proposing and qualifying initiatives would be significantly more expensive under § 3599.111.

Another difference between § 3599.111 and the other state provisions is the penalty for a violation. The New York provision makes a violation a misdemeanor punishable by up to one year of imprisonment, a fine of $100 to $500, or both. *Person*, 467 F.3d at 143 (citing N.Y. Elec. L. § 17-122(1), violation of which is a misdemeanor); N.Y. Elec. L. § 17-166 (stating that penalty for any such

misdemeanor violation). Similarly, the North Dakota provision makes a violation a misdemeanor punishable by up to one year of imprisonment, a fine up to $2,000, or both. *IRI*, 241 F.3d at 616 (citing N.D. Cent. Code § 16.1-01-12(11), violation of which is a class A misdemeanor); N.D. Cent. Code § 12.1-32-01(5) (describing the penalty for a class A misdemeanor). Violation of the Oregon provision is punishable by a minimum of a $100 civil fine. *Prete*, 438 F.3d at 952 n.1. In contrast, anyone who was to violate § 3599.111 would be guilty of a felony punishable by imprisonment between six and twelve months, a fine up to $2,500, or both. O.R.C. § 3599.111(E) (stating that violation of the Ohio provision constitutes a felony of the fifth degree); O.R.C. § 2929.14(A)(5) (describing the penalty for a felony of the fifth degree).

With the broader ban on the types of payment and harsher criminal sanctions for violations, Ohio's provision lies closer to the complete ban in *Meyer* than the partial bans in the other circuit court cases.[3] As the Supreme Court explained in *Meyer*, "The First Amendment protects [petitioners'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." 486 U.S. at 424. While petitioners are not

---

[3] We take no position on the hypothetical question of whether, if Ohio were to enact a partial ban similar to Oregon's, North Dakota's or New York's, that partial ban would be subject to the less exacting review of *Timmons*. The constitutional analysis is, as we have noted, fact- and context-intensive. There may be significant differences between how Ohio and those other States govern and operate their respective petition drives and elections which would make even a lesser ban in Ohio subject to the more exacting scrutiny of *Meyer*. But, again, as the question is not before us, we will address the matter no further.

constitutionally guaranteed an endless variety of means, when their means are limited to volunteers and to paid hourly workers who cannot be rewarded for being productive and arguably cannot be punished for being unproductive, they carry a significant burden in exercising their right to core political speech.

3. The State's Interest in Eliminating Fraud

When a State places a severe or significant burden on a core political right, like here, it faces a "well-nigh insurmountable" obstacle to justify it. *Meyer*, 486 U.S. at 425; *cf. Buckley*, 525 U.S. at 192 n.12. The provision must be narrowly tailored and advance a compelling state interest. *Timmons*, 520 U.S. at 358; *Meyer*, 486 U.S. at 423-24. Although a State need not present "elaborate, empirical verification" of the weight of its purported justification when the burden is moderate, see Timmons, 520 U.S. at 364, it must come forward with compelling evidence when the burden is higher, *see Buckley*, 525 U.S. at 203-04; *Meyer*, 486 U.S. at 425-28.

While eliminating election fraud is certainly a compelling state interest, § 3599.111 is not narrowly drawn. First, there is no evidence in the record that most, many, or even more than a de minimis number of circulators who were paid by signature engaged in fraud in the past. The State points primarily to the 2004 presidential election, when circulators trying to get Ralph Nader on the ballot engaged in fraud. The circulators were paid on a per-signature basis. *CTR*, 462 F. Supp. 2d at 834. While this is evidence that circulators who were paid per-signature engaged in

fraud, it does not prove that the per-signature feature actually caused or significantly contributed to the circulators' fraudulent acts. At most, the evidence of fraud associated with the Nader election effort and other elections is evidence of correlation, not causation.

Of course, just as CTR argues that per-signature payment creates a better incentive for hard, efficient work and valid signatures, it cannot escape the flip-side of the argument: the payment also creates an economic incentive to engage in fraud by padding signatures (whether by forgery, false certification or false pretense). Just as the Supreme Court took judicial notice in *Meyer* that "it is often more difficult to get people to work without compensation than it is to get them to work for pay," 486 U.S. at 423, we can take judicial notice that there is an incentive to inflate the measure of output when payment is directly tied to that output. If a person gets paid by the hour, there is an incentive to pad hours; if a person gets paid by the signature, there is an incentive to pad sig atures.

That is not to say, of course, that someone faced with the incentive to pad signatures will actually act upon it. That is an empirical question, one for which there is little in the record to answer. The State has not, for example, pointed to evidence from Oregon suggesting a marked decrease in the level of election fraud since its per-signature ban was enacted. While there is some evidence that validity rates have increased, *see supra*, there are many non-fraudulent reasons why signatures are rejected (e.g., insufficient information about the signer, illegible handwriting). The State's correlation evidence is relevant, if only circumstantial, evidence, but it is a

far cry from showing that the provision is narrowly tailored (or even reasonably tailored) to the State's legitimate interest in reducing election fraud. As explained in *Meyer*, courts should not be "prepared to assume that a professional circulator—whose qualifications for similar future assignments may well depend on a reputation for competence and integrity—is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." 486 U.S. at 426.

Moreover, Ohio already has criminalized election fraud, specifically with regard to false signatures. *See* O.R.C. § 3599.28 (making false signatures on election-related documents a felony of the fifth degree). This and other criminal provisions of Ohio election law are the types of protections that the Supreme Court has found "adequate" to deter improper conduct with regard to petition circulation, "especially since the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." *Meyer*, 486 U.S. at 427 (citations omitted).

Accordingly, under the exacting scrutiny of *Meyer* and *Buckley*, Ohio's per-time-only requirement is not sufficiently tied to its otherwise legitimate interest.

III

The State of Ohio argues in large measure that CTR's evidence of increased costs establishes not a free-speech problem, but a business problem. Yet, the State largely misses the point that free speech can be costly. By making speech more costly,

the State is virtually guaranteeing that there will be less of it. Because its ban on all forms of payment to circulators except based on the amount of time worked would create a significant burden on CTR's and other petitioners' core political speech rights, the State must justify it with a compelling interest and narrowly tailored means. It fails to raise a genuine issue of material fact that § 3599.111 is narrowly tailored. Therefore, we **AFFIRM** summary judgment in favor of CTR.

APPENDIX B

ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Citizens for Tax Reform, et al.,

Plaintiffs,

v.

Joseph T. Deters, et al.,

Defendants.

Case No. 1:05-CV-212
District Judge Susan J. Dlott

ORDER

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment (doc. 29), the State of Ohio's Motion for Summary Judgment (doc. 33), Defendant Joseph T. Deters' Motion for Summary Judgment (doc. 32), and Defendant Mathias H. Heck, Jr.'s Motion for Summary Judgment (doc. 34). For the reasons that follow, Plaintiffs' Motion, Deters' Motion, and Heck's Motion are **GRANTED**, and the State of Ohio's Motion is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Ohio Revised Code ("O.R.C.") § 3599.111 ("the Statute") states in relevant part as follows:

> (B) No person shall receive compensation on a fee per signature or fee per volume basis for circulating any declaration of candidacy, nominating petition, initiative petition, referendum petition, recall petition, or any other election-related petition that is filed with or transmitted to a board of elections, the office of the secretary of state, or other appropriate public office. * * *
>
> (D) No person shall pay any other person for collecting signatures on election-related petitions or for registering voters except on the basis of time worked.

O.R.C. § 3599.111.

Plaintiffs Citizens for Tax Reform ("CTR") and Jeffrey P. Ledbetter, a former Treasurer of CTR, filed a Verified Complaint on April 1, 2005 challenging the constitutionality of the O.R.C. § 3599.111 on the grounds that the prohibition of payment to petition circulators on a per-signature or per-volume basis violated their core political speech rights. (Doc. 1.) Plaintiffs named as defendants Joseph T. Deters, the Hamilton County, Ohio prosecutor, and Mathias H. Heck, Jr., the Montgomery County, Ohio prosecutor, both in their official capacities only, as persons responsible for the enforcement of the Statute. (Id.)

Prior to the effective date of the Statute, CTR had engaged a political consulting firm on the basis of a fixed fee contract to secure the necessary

signatures to qualify a proposed constitutional amendment for the November 2005 Ohio general election. Pursuant to the contract, CTR was to pay the firm $1.70 per signature for a total of approximately 450,000 signatures. After the Statute became effective, CTR was not permitted to pay circulators on a per-signature or on any per-volume basis. The political consulting firm was no longer willing to collect signatures pursuant to the agreed-upon fixed-fee contract and it estimated that the cost for gathering the signatures would increase by more than $300,000. Plaintiffs asserted that the Statute increased the cost of qualifying their proposed amendment, made it more difficult to raise money necessary to fund the initiative effort, and that they had refrained from attempting to qualify the proposed amendment for the ballot so long as the Statute was in force. (Id.)

The Ohio Attorney General moved to intervene as a defendant in this action on March 11, 2005 in order to defend the constitutionality of § 3599.111 and the Court issued a Notation Order permitting the intervention on March 12, 2005. (Doc. 7.)

On March 19, 2005, Chief Judge Sandra Beckwith issued a Temporary Restraining Order enjoining the enforcement of O.R.C. § 3599.111. (Doc. 16.) Chief Judge Beckwith found that Plaintiffs "have introduced actual evidence that tends to show that the restriction on payment of petition circulators on a per-signature basis limits their ability to retain effective circulators and reduces the likelihood that they will succeed in placing their initiative on the November 2005 ballot." (Id. at 9.) She further found that the State of Ohio did not

adduce evidence of the necessity of the law to prevent fraud. She stated that the State's evidence that fraud occurred when circulators were paid on a per-signature basis in Ohio was not sufficient to establish that the per-signature basis was cause of or an incentive to the fraud. (Id.) The State had not proven "that compensation on a per-signature basis generates fraud at a greater rate than other forms of compensation." (Id.)

On May 4, 2005, March 22, 2006, and April 16, 2006, the Court issued Agreed Orders extending the temporary restraining order until October 15, 2005,[1] extending it to cover the amendments to the law that took effect on May 2, 2005,[2] and extending it pending a final disposition in this case. (Docs. 20, 42, 46.)

II. ANALYSIS

A. Defendants Deters' and Heck's Motions for Summary Judgment

Defendants Deters and Heck move for summary judgment on the basis that the State of Ohio has intervened to defend the State of Ohio Statute. Defendants also admit that they will be bound by an adverse ruling against the State of Ohio as to the validity of the Statute. Plaintiffs have presented no argument or evidence suggesting that the county prosecutors are necessary to a complete

---

[1] The Court originally issued a Temporary Restraining Order and then extended that TRO. For reasons not clear in the record, the TRO is referred to as a preliminary injunction in CM/ECF document numbers 42 and 46.

[2] The amendments primarily concerned the punitive provisions of the law and are not relevant to the constitutional issues before the Court.

and final adjudication of this matter. Accordingly, Deters' and Heck's Motions for Summary Judgment are **GRANTED**.

B. Plaintiffs' and the State of Ohio's Cross-Motions for Summary Judgment

Plaintiffs have moved for summary judgment seeking a declaration that the Statute is unconstitutional and an order enjoining enforcement of the Statute. The State of Ohio has filed a cross-motion for summary judgment.

"Petition circulation is core political speech because it involves interactive communication concerning political change." Buckley v. American Const. Law Found., Inc., 525 U.S. 182, 186 (1999) (citation omitted). It "involves both the expression of a desire for political change and a discussion of the merits of the proposed change." Meyer v. Grant, 486 U.S. 414, 421 (1988). Petition circulators must convince the signators that the subject matter of the petition "is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate." Id.

Analysis of the particular restriction at hand, the prohibition of a per-signature payment scheme, must first begin with the recognition that the Ohio General Assembly could not have acted to prohibit all forms of payment to petition circulators. The United States Supreme Court declared in 1988 that a Colorado statute that prohibited payment to petition circulators was an infringement of rights of political speech guaranteed by the First Amendment. Id. at 422-24. The Court held that the prohibition restricted core political speech because it "limits the

number of voices who will convey [the political] message and the hours they can speak and, therefore, limits the size of the audience they can reach" and second it "makes it less likely that [the proponents of the amendment] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Id. at 423.

The Supreme Court stated that petition/initiative proponents had a "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." Id. at 424. The Court considered the State of Colorado's expressed justifications for the restriction of a protected right, including the protection of the integrity of the initiative process. Id. at 425. The Court concluded, however, that Colorado had "failed to demonstrate that it is necessary to burden [the amendment proponents'] ability to communicate their message in order to meet its concerns." Id. at 426. The Supreme Court noted the State of Colorado offered no evidence to support its theory that the prohibition was necessary to eliminate the temptation to "accept false signatures" and the Court stated that it was unprepared to assume that a "professional circulator--whose qualifications for similar future assignments may well depend on a reputation for competence and integrity--is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." Id. The Meyer Court expressed that it was persuaded by the existence of Colorado laws creating criminal penalties for forging a signature on a petition, making false or misleading statements relating to a petition, or paying someone to sign a petition. See id.

at 427. The Court stated that those "provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." Id.

Following Meyer, the Supreme Court had another opportunity to set forth the standard by which to evaluate the constitutionality of different types of election laws. The Supreme Court set forth a sliding scale test as follows:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Timmons v. Twin Cities Area New Party, 520 U.S. 351, 358-59 (1997) (internal quotations and citations omitted) (deciding that a state law forbidding a single person from being listed as the candidate for more than one political party was constitutional).

Finally, the Supreme Court addressed three different conditions Colorado had placed on the ballot-initiative process by law: (1) a requirement that petition circulators be registered voters; (2) a

requirement that circulators wear an identification badge; and (3) a requirement that initiative proponents report the name and address of all paid circulators and the amount paid to each circulator. Buckley, 525 U.S. at 186. After stating that petition circulation is core political speech, the Supreme Court explained that "'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'" Id. at 192. The Court cited Timmons and then reviewed each restriction. It did not however, specify whether each restriction was a severe burden on speech necessitating strict scrutiny or a lesser burden justifiable by a reasonable, nondiscriminatory reason. See id. at 193; id. at 206 (Thomas, J. concurring). The Court ultimately struck down each of the three restrictions. It found as to the registered voter requirement and the name badge requirement that both discouraged participation in the petition circulation process, which limited the number of voices who could carry the petitioner's message and cut down the size of the audience they could reach, and found that Colorado failed to justify that burden. Id. at 194-95, 200.

Based on these Supreme Court precedents, the Court must determine whether the Statute burdens First Amendment rights and whether the State's interest in preventing fraud justifies the burden on speech. The State contends that the Statute is only a lesser burden on speech subject to less exacting review under Timmons. Plaintiffs, on the other hand, contend that the Statute is a burden on core political rights under Meyer and that the Statute should be subject to strict scrutiny analysis.

The Court finds that Plaintiffs have established with evidence that the Ohio Statute burdens their core political speech rights. As Chief Judge Beckwith found in Temporary Restraining Order, Plaintiffs have introduced actual evidence that tends to show that the Statute limits their ability to retain effective circulators and reduces the likelihood that petition proponents will be able to place their petitions on the ballot. For example, prior to the enactment of the Statute, CTR retained Arno Political Consulting ("Arno PC") to obtain 450,000 signatures to place the so-called "TEL Amendment" on the ballot at the cost of $1.70 per signature for a total of $765,000. CTR had determined, based on its work on a previous ballot initiative, that it would not be able to gather the number of necessary signatures without engaging professional circulators. After the Statute was passed, Arno PC indicated that it would have to be paid on a "time and materials" basis, requiring a monthly management fee of $45,000 plus costs, and estimated that its total fee would exceed $1 Million. Plaintiff Ledbetter stated in his affidavit that CTR would not have been able hire Arno PC on a time and materials contract, and thus would not have been able to pursue its goal of placing the TEL Amendment on the ballot, if the Statute had not been enjoined in this litigation. In fact, CTR eventually paid Arno PC $846,346.70 for the collection of 497,851 signatures pursuant to the fixed-price contract. With the benefit of hindsight, and believing that it would have had to hire employee supervisors to manage circulators who worked in the more rural counties in Ohio, Arno PC would have charged CTR approximately $1.5 Million to collect the signatures on a cost and materials basis.

Likewise, Lee Albright, the President of National Petition Management, another consulting firm who has successfully qualified four measures for the ballot in Ohio prior to enactment of the Statute, estimated that it would cost 60% more to qualify ballot measures in Ohio if the Statute was enforced. Additionally, Michael Arno, President of Arno PC, stated that his firm had difficulty hiring the more experienced and trustworthy circulators to work in the State of Oregon after it prohibited per-signature payments, and he believed the same problem would arise in Ohio if the Statute is enforced. Arno also stated his opinion that circulators paid per-signature "are much more careful and diligent about collecting signatures [than circulators paid by time worked] in part because circulators are 'selling' each signature . . . and [political consulting firms] will not 'buy' a signature it deems questionable." (Arno Decl. ¶ 33.) Tracy Taylor, who runs Taylor Petition Management, a mid-level firm that recruits and hires the circulators, testified that firms can control quality better under a per-signature payment scheme because they only pay circulators for signatures that appear to be valid. Taylor has worked under both the per-signature payment schemes and time-based payment schemes and testified that qualifying initiatives took more time and cost more money under the time-based schemes. Taylor also testified that he had trouble retaining the top coordinators who had worked on prior Ohio initiatives to work on the TEL Amendment because of the hourly pay system in place before the Statute was enjoined.

Gena Ranger supports Arno's and Taylor's testimony. Ranger states in her declaration that she is a professional circulator who has worked in more than a dozen states and has worked in Ohio for five

statewide petition efforts in 2003, 2004 and 2005. Ranger refused a request by Taylor Petition Management to participate in a petition drive in Ohio in 2005 after being told she would be paid by the hour. She also refuses to participate in petition drives in Oregon (where she had previously worked before a per-signature prohibition was passed) or in other states where per-signature payment is prohibited. She stated that she believes she can make more money "being paid on a per-signature basis working on petition efforts in states that do not Prohibit per-signature payment."

The State challenges the Plaintiffs' evidence delineated above as proving at most a financial disincentive, not a political speech impediment. The State also asserts that the experience in Oregon after Oregon prohibited per-signature payments to circulators, establishes that such laws impose only a lesser burden on speech. Certified results from the Secretary of State of Oregon demonstrate that seven election measures qualified for the ballot in Oregon in 2002, before Oregon prohibited per-signature payments, and six measures qualified in 2004, after the prohibition was passed. Moreover, the signature validity rate increased from 67.92% in 2002 to 72.35% in 2004 after the prohibition was passed.

The Court questions the probative value of this limited data from Oregon. Without more data and without a more sophisticated analysis, the Court cannot determine whether factors apart from the change in payment scheme might have impacted the 2002 results or the 2004 results. Further, the Court questions this limited data, and to some degree questions any testimony, equating the Oregon initiative experience to the Ohio initiative experience

because it is not an apples to apples comparison. The laws in the two states have fundamental differences. The Ohio Statute permits payments only if made on the basis of time worked. O.R.C. § 3599.111. The Oregon Constitution, as revised, prohibits payments based on the number of signatures obtained. Or. Const. Art. IV § 1b. But this Constitutional provision has been interpreted in the Oregon Administrative Rules as not prohibiting salary raises or bonuses based on circulator's productivity, so long as the payment is not based on a per signature calculation. Or. Admin. R. 165-014-0260. Also, circulators in Ohio face a special challenge in that a certain percentage of total signatures must be gathered from each of one-half of the 88 counties in Ohio, which necessitates that circulators gather signatures from lesser populated counties. Ohio Const. Art. II § 1g. Michael Arno testified that in Oregon petition circulators focus most of their attention on the Portland area. The Ohio county-distribution requirement would appear to make gathering signatures in Ohio a more difficult effort in the best of circumstances.

Finally, in Ohio, each signature on a part-petition, as the signature sheets are called, is verified individually by the county board of elections for the county in which the signators reside to determine if the signators are registered voters and to eliminate any potential instances of fraud. O.R.C. § 3519.15. In Oregon, conversely, the Secretary of State verifies the petitions using "a statistical sampling technique to verify whether a petition contains the required number of signatures of electors." Or. Rev. Stat. 250.105(4). It also then employs statistical sampling to select a fraction of the petition signatures to verify. Or. Admin. R. 165-

014-0110. Thus, the likelihood of finding any instances of irregularities or fraud that might have occurred in the petitions appears to be greater in Ohio.

On the whole, Plaintiffs' evidence establishes that the Statute would burden initiative proponents in Ohio by increasing their costs, increasing the time needed to qualify ballot measures, and as a result, making it more difficult to collect signatures and place measures on the ballot. Undoubtedly, the Statute, though not as burdensome as the complete payment prohibition struck down in Meyer, both "limit[s] the number of voices who will convey [the political] message and the hours they can speak and, therefore, limits the size of the audience they can reach" and "mak[es] it less likely that [the proponents of the amendment] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Meyer, 486 U.S. at 423.

As to the State's justification for the per-signature payment prohibition, the State relies in large part upon the documented instances of irregularities or fraud that occurred in the signature collection effort to place Ralph Nader's name on the ballot for the 2004 presidential election. The Nader petition circulators were paid on the per-signature basis. The fraud included instances where the name of the petition circulator was forged, where persons who signed off as the petition circulator did not actually circulate the petition or witness the signators' signatures, and where petition circulators misrepresented that the Nader petition was a petition related to same-sex marriage. (Doc. 9-4.)

Chief Judge Beckwith, in the Temporary Restraining Order, criticized this evidence as not proving that the method of payment was the cause of or incentive to the fraud. This Court agrees. The Nader evidence does not establish that the fraud would have been less likely to occur had the circulators been paid on a hourly basis.

The State also submits the affidavit of Bryan C. Williams, Director of the Summit County Board of Elections, who testified about an instance in Summit County where one petition circulator who was paid per-signature had his part-petitions invalidated in toto based on numerous irregularities in the part-petitions. (Doc. 35.) A great number of the signatures on the part-petitions were determined to contain the names of persons who were not registered voters. Like the Nader petition evidence, the Williams affidavit in no way isolates the per-signature payment method as the cause of the irregularity. Other evidence submitted by the State regarding supposed fraud in Ohio similarly fails to prove that the per-payment signature method is an incentive to fraud. A criminal indictment against Kevin Eugene Dooley in Franklin County, Ohio for forging a false voter registration form proves nothing, primarily because the Court will not infer guilt from an indictment. (Doc. 37.) Interestingly, the indictment alleges that Dooley was paid both per hour and a fee for each new voter registered above a set goal. An indictment against and guilty plea by Chad A. Staton in Defiance County, Ohio for ten counts of false voter registration does not contain any information from which the Court could infer that Staton was paid per-signature or that such payment was the motivation for the fraud. (Doc. 39.) Finally, the Court struck as inadmissible "evidence" in the form of

newspaper articles discussing possible instances of irregularities in the November 2006 election. (Doc. 58.) The newspaper articles did not support the State's argument in any event because, among other reasons, the articles did not establish that the circulators involved were paid on a per-signature basis.

The State also submits evidence related to instances of fraud in Oregon by circulators working under the per-signature payment method before Oregon passed a per-signature payment prohibition. The evidence is submitted in the form of an affidavit of John Lindback, the Director of the Election Division for the Oregon Secretary of State's office, and supporting exhibits. (Doc. 51-2.) Plaintiffs challenge the admissibility of the Lindback affidavit and exhibits on a Rule 56 motion. The main point of Lindback's affidavit testimony is his belief that "per-signature payments are a significant incentive to fraud." (Doc. 51-2 ¶ 12.) He states that he bases his conclusion on his "comprehensive catalog of experience," including "substantial responsibility for investigating complaints related to initiative and referendum process and reviewing reports generated during such investigations." (Id. ¶¶ 1, 13.) He then identifies several ways that circulators perpetuated fraud when gathering signatures in Oregon and he cites to anecdotal evidence based on investigative reports and a deposition that are attached as exhibits to his affidavit.

The investigative report exhibits concern investigations conducted at the request of Lindback's office regarding suspected incidents of petition signature fraud. (Doc. 51-2.) The investigative reports and the factual findings therein are

admissible under the public records and reports hearsay exception contained in Rule 803(8)(c) of the Federal Rules of Evidence. However, the numerous sections of the investigative reports that merely recount witness interviews are inadmissible as hearsay under Rule 801 of the Federal Rules of Evidence. Nowell v. City of Cincinnati, 2006 WL 2619846, at *5 (S.D. Ohio Sept. 12, 2006) (Dlott, J.); see also Chicago Ins. Co. v. Chiminee Cricket, 17 Fed. Appx. 374, 378 (6th Cir. 2001) (not admitting investigation report based on untrustworthy witness hearsay statements); but see Leary v. Livingston Cty., 2006 WL 2865213, at *5 (E.D. Mich. Oct. 5, 2006) ("The reports, and accompanying statements made by witnesses recorded in the reports, fall under this [Rule 803(8)] exception."). The difficulty here is that the investigative reports are almost devoid of factual findings, and instead contain only witness statement summaries. The Lindack affidavit also references and contains as an exhibit a small portion of a deposition transcript from an Oregon case. That deposition is not admissible for the truth of the matters asserted therein in this case.

The Court finds that the Lindback affidavit, and the exhibits attached thereto, are not probative of the issue before the Court even to the extent they are admissible. The affidavit and exhibits would tend to establish that certain circulators in Oregon who were paid on a per-signature basis or a productivity basis submitted numerous false signatures. However, as discussed above, stark differences exist between the Ohio initiative process and the Oregon initiative process. The Court will not extrapolate that the per-signature payment method is an incentive to fraud in Ohio, whereas an hourly payment system would discourage fraud in Ohio,

based on instances of apparent fraud occurring in a different state where signatures are verified using a statistical sampling method.

In sum, the Court finds that the State has not submitted evidence that the per-signature payment method is such an incentive to fraud that would justify the burden the Statute places on initiative proponents' core political speech rights. The Court's decision is informed by a growing body of jurisprudence examining similar per-signature payment prohibitions enacted in other states. In earlier district court cases striking down laws that prohibited per-signature payment, a common theme was the defendants' failure to provide evidence that the per-signature method of payment caused actual fraud.

A district court analyzing a Washingon law framed the issue as follows: "Unless there is some proof of fraud or actual threat to citizens' confidence in government which would provide a compelling justification, the right of public discussion of issues may not be infringed by laws restricting expenditures on referenda and initiative campaigns." LIMIT v. Maleng, 874 F.Supp. 1138, 1141 (W.D. Wash. 1994). The defendants conceded that they had no actual proof of fraud stemming from the payment of per-signature method of collection. Id. at 1140. The court held that the Washington law was unconstitutional. Id. at 1140-41.

In Mississippi, the plaintiffs challenging a law prohibiting per-signature and per-petition payment schemes established that the law burdened political expression, including with evidence that circulators paid a flat daily rate collected "far fewer" signatures

than those paid per-signature and that some circulators would only work on a per-signature basis. See Term Limits Leadership Council v. Clark, 984 F.Supp. 470, 471-73 (S.D. Miss. 1997). Conversely, the defendants offered only speculation, not direct evidence, that circulators paid per-signature were more likely to commit fraud than circulators paid per-day or per-hour. Id. at 474-75. Thus, the court found that the law violated the First Amendment. Id. at 470-71.

Likewise, opponents of a similar law in Maine presented evidence from their personal experience in Maine and in another state that per-signature payment prohibitions created uncertainties in the cost and length of petition circulation, increased the costs of petition circulation, required additional hires, and resulted in the collection of fewer signatures. See On Our Terms '97 PAC, 101 F.Supp.2d 19, 22-23 (D. Me. 1999). The State of Maine did not offer evidence that there was a higher incidence of fraud based on the per-signature method than there is with other methods. Id. at 25. The court held that the law was unconstitutional because it severely burdened First Amendment speech, but was not narrowly tailored to serve a compelling state interest. Id. at 25-26.

The District Court for Idaho applied strict scrutiny analysis from Meyer when it struck down a law prohibiting per-signature payments. Idaho Coalition United for Bears v. Cenarrusa, 234 F.Supp.2d 1159, 1165 (D. Idaho 2001) (quoting Idaho Code § 34-1821). Because the court found that the law chilled protected speech and did not find evidence that payment on a per-signature basis

encouraged fraud, it held that the law violated the First Amendment. Id. at 1165-66.

In three later court of appeals decisions, the appeals courts accepted the evidence submitted by the respective states that the per-signature payment prohibition was necessary to ensure the integrity of the voting process. In Initiative & Referendum Inst. v. Jaeger, 241 F.3d 614 (8th Cir. 2001), North Dakota produced evidence concerning an incident in 1994 where 17,000 petition signatures were invalidated and "a subsequent investigation revealed that payment per signature was an issue in the 1994 incident." Id. at 618. It is not clear from the decision exactly what the Ninth Circuit panel meant by the phrase "payment per signature was an issue" and it is therefore difficult to compare the quantum of evidence submitted in that case to the evidence submitted by the State of Ohio here. Perhaps more importantly, the court found in Jaeger, unlike here, that the plaintiffs had offered only bare assertions, and not evidence, that a payment per-hour scheme would burden their ability to collect signatures.

The Ninth Circuit likewise upheld the Oregon per-signature payment prohibition, but again the evidence submitted in that case was of a different quality than the evidence submitted here. Prete v. Bradbury, 438 F.3d 949, 961-62 (9th Cir. 2006). The Prete court found that the law imposed only a lesser burden on free speech, and Oregon had an "important regulatory interest in preventing fraud and its appearances in its electoral processes." Id. at 969-71. It accepted Oregon's evidence that some signature gatherers paid per-signature had engaged in fraud. Id. at 970. But it rejected the plaintiff's claims that per-signature payment prohibition

decreased the pool of circulators, made it more difficult to qualify initiative or referendum measures for the ballot, and resulted in a significant decrease in the number of valid signatures obtained. Id. at 963-64.

The Ninth Circuit discounted testimony from the plaintiffs' witnesses, including William Arno and Tracy Taylor, that professional petitioner circulators would not be interested in circulating petitions in Oregon after the per-signature payment prohibition passed because the Arno and Taylor could not testify that the circulators would work in Oregon in the absence of the prohibition. Id. at 964. No witness in Prete testified that he or she would have worked in Oregon in the absence of the prohibition. Plaintiffs here presented stronger evidence. Tracy Taylor testified that the top coordinators he had used for prior Ohio initiatives refused to work in Ohio on an hourly pay basis. (Taylor Dep. at 53.) Taylor's testimony is boosted by that of Gena Ranger who stated that she would not work in Ohio, where she had worked before, for hourly pay. (Ranger Decl. ¶ 5.)

The plaintiffs' case in Prete also was hurt when the Ninth Circuit credited the testimony of a professor who stated that the limited available evidence suggested that circulators paid by the hour obtained a higher validity rate than those paid per-signature. Id. at 966. The State of Ohio offers no evidence that circulators paid per-hour would have similar success in Ohio and the difference in the initiative procedures in the two states cautions against using the Oregon experience as a predictor of what would happen in Ohio. Even the Prete court noted that the Oregon law did "not prohibit adjusting

salaries or paying bonuses according to validity rates or productivity." Id. at 968.

Finally, and most recently, in a short decision issued under time constraints, the Second Circuit held consistent with Jaeger and Prete that a prohibition on per-signature payment "does not impose unduly burdensome and unjustified restrictions on the payment of petition signature collectors." Person v. New York State Bd. of Elections, – F.3d –, 2006 WL 2961240, at *2 (2nd Cir. Oct. 18, 2006). The court explained its decision as follows: "[W]e find the record presented to us provides insufficient support for a claim that the ban on per-signature payment is akin to the complete prohibition on paying petition circulators that was deemed unconstitutional in Meyer, or that the alternative methods of payment it leaves available are insufficient." Id.

However, the opinion is so lacking in legal analysis as to be of little persuasive authority. In sum, the Court is satisfied that this case, based on the evidence submitted, is more analogous to the District Court decisions in which similar per-signature prohibitions were struck down than to the Circuit Court of Appeals decisions where such prohibitions were upheld. CTR has established with evidence that the Ohio Statute would burden the core political speech of initiative proponents by making it more difficult to retain circulators to communicate their political message, thus limiting the size of the audience it can reach and making it less likely that they will gather the number of signatures needed to place an initiative on the ballot. See Meyer, 486 U.S. at 423. Conversely, while the State of Ohio's evidence might show that fraud has

occurred when the payment per-signature method is used, it has not isolated the form of payment as being the cause of or an incentive to widespread petition signature fraud in Ohio. As such, the Court finds that O.R.C. § 3599.111 is unconstitutional.

For the foregoing reasons, the Plaintiffs' Motion for Summary Judgment is **GRANTED** against the State of Ohio and the State of Ohio's Motion for Summary Judgment is **DENIED**.

III. CONCLUSION

The Court hereby GRANTS the Motions for Summary Judgment filed by Defendants Joseph T. Deters and Mathias H. Heck, Jr. (docs. 32, 24.) The Court hereby further **GRANTS** Plaintiffs' Motion for Summary Judgment (doc. 29) against the State of Ohio, **DENIES** the State of Ohio's Motion for Summary Judgment (doc. 33), declares that the O.R.C. § 3599.111 is unconstitutional, and enjoins its enforcement.

IT IS SO ORDERED.

s/Susan J. Dlott
United States District Judge

APPENDIX C

TEMPORARY RESTRAINING ORDER

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

Citizens for Tax Reform, et al.,

Plaintiffs,

vs.

Joseph T. Deters, et al.,

Defendants.

Case No. 1:05-CV-212

Temporary Restraining Order

Citizens for Tax Reform wishes to circulate an initiative petition for the purpose of placing a proposed amendment to the Ohio Constitution on the November 2005. Prior to March 31, 2005, Plaintiffs had engaged Arno Political Consultants ("Arno"), a California-based political consulting firm that specializes in collecting signatures for initiative and referendum efforts, to collect signatures on their initiative petitions through the use of circulators paid on a per-signature basis. When Plaintiffs entered into their agreement with Arno the use of paid circulators was legal in the State of Ohio. On March 31, 2005, however, Ohio Revised Code ("O.R.C.") § 3599.111, which prohibits the use of circulators paid on a per-signature basis, became

effective. Plaintiffs then initiated this action, alleging that the newly effective statute violates rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution. They simultaneously filed the motion for temporary restraining order that is presently before the Court.

The parties agree that the ostensible purpose of the challenged statute is the prevention of fraud in the process of collecting signatures on political petitions, including initiative petitions. The Ohio General Assembly passed the statute as a reform to Ohio's initiative and referendum process in response to extensive fraud in the collection of signatures on petitions supporting the placement of Ralph Nader's name on the Ohio ballot for President of the United States in November 2004. Some or all of that fraud was perpetrated by petition circulators who were paid on a per-signature basis.

Defendants herein, including the Intervenor-Defendant, Ohio Attorney General James Petro as representative of the State of Ohio, have not introduced evidence or otherwise suggested that professional circulators paid on any basis other than per signature were involved in the circulation of petitions favoring the addition of Mr. Nader to the Ohio presidential ballot. In other words, the State has not attempted to demonstrate, by means other than supposition, that the method of calculating the pay of the paid circulators was the cause of the fraud. The State has argued that reason supports its position that the incentive to commit fraud is greater when payment is made on a per signature, rather than a per hour or other time incremental, basis.

The State acknowledges that the General Assembly could not have acted to prohibit all circulation of petitions in Ohio by paid circulators. The United States Supreme Court declared in 1988 that a Colorado statute that prohibited payment to petition circulators was an infringement of rights of political speech guaranteed by the First Amendment. See Meyer v. Grant, 486 U.S. 414, 422-23 (1988). The Court held that the prohibition restricted political speech by limiting "the number of voices who will convey [the political] message and the hours they can speak and, therefore, limits the size of the audience they can reach." Id. The Court identified a second manner in which the prohibition restricted core political speech, which, the Court stated, includes the circulation of petitions: "it makes it less likely that [the proponents of the amendment] will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion." Id. at 423.

The Supreme Court did not invalidate all restrictions on core political speech in the form of the circulation of petitions; although, it did explicitly recognize that the First Amendment protects amendment proponents' "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." Id. at 424. The Court considered the State of Colorado's expressed justifications for the restriction of a protected right, including the protection of the integrity of the initiative process. See id. at 425. The Court concluded, however, that Colorado had "failed to demonstrate that it is necessary to burden [the amendment proponents'] ability to communicate their message in order to meet its concerns." Id. at

426. The Court noted the lack of evidence in support of the State's theory that the prohibition was necessary to eliminate the temptation to "accept false signatures" and stated that it was unprepared to assume that a professional circulator "whose qualifications for similar future assignments may well depend on a reputation for competence and integrity" is more likely to accept false signatures than a volunteer. Id.

The Meyer court expressed that it was persuaded by the presence in the Colorado statutes of criminal penalties for forging a signature on a petition, making false or misleading statements relating to a petition, or paying someone to sign a petition. See id. at 427. The Court noted that those "provisions seem adequate to the task of minimizing the risk of improper conduct in the circulation of a petition." Id. The State of Colorado had, apparently, not attempted to demonstrate that it had prosecuted or investigated offenses of the criminal statutes and yet failed to curtail fraud in the petition process. So, the Court recognized the theoretical possibility that a governmental interest might compel a restriction on the right to circulate a petition, but it did so while affirming that the area is one in which the protection of the First Amendment is "at its zenith" so that the burden a state must overcome to justify a restriction is "well-nigh insurmountable." Id. at 425.

Since the Meyer decision, various federal courts have considered state statutes prohibiting the payment of petition circulators on a per signature basis. In LIMIT v. Maleng, 874 F.Supp. 1138 (W.D. Wash. 1994), for example, the Court concluded that a Washington statute prohibiting the use of circulators paid per signature was not justified by actual

evidence that that method of payment increased the incidence of fraud. The court observed that actual evidence was required in the context of constitutional challenges to legislation restricting expenditures in ballot referenda and initiative campaigns. See id. at 1141 (citing Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981)). The Court struck down the Washington statute. See id. at 1142.

A Maine district court struck down a similar Maine statute for the same reason. See On Our Terms '97 PAC v. Secretary of State, 101 F.Supp.2d 19 (D.Me. 1999). The court observed that the state had offered "no evidence whatsoever that fraud is more pervasive among circulators paid per signature." Id. at 26. The court specifically rejected that state's "supposition" that payment may affect the incidence of fraud, noting that a state must establish that "its regulation is narrowly tailored to meet a compelling need." Id. at 25 (citing Meyer, 486 U.S. at 426).

A third district court, sitting in Mississippi, invalidated a similar Mississippi statute on the same basis. See Term Limits Leadership Council, Inc. v. Clark, 984 F.Supp. 470 (S.D. Miss. 1997). The court noted that Mississippi could not "avoid strict scrutiny of the statute[], which is to say, it cannot avoid its burden to justify that statute[] by demonstrating a compelling interest and showing further that the statute[is] the least restrictive means of addressing the state's interest." Id. at 473 (citing Meyer, 486 U.S. at 424). The court observed that Mississippi's effort to justify the statute by supposition "flies directly in the face of Supreme Court's refusal in Meyer to assume that paid petition

circulators were more likely to commit fraud than volunteers." Id. at 473 n.3.

In the Mississippi case, the state had argued, as Ohio has in this matter, "that paying circulators on a per-signature basis encourages fraud by those circulators since it gives them incentive to obtain signatures by any possible means, including fraud." Id. at 474. The court concluded that that hypothesis, however rooted in logic or expert opinion, did not tend to prove what the State must prove, namely, actual fraud or threat to citizens' confidence in government posed by . . . circulators who are paid per signature." Id. at 475. The court reiterated that the Meyer court had identified the state's burden as showing "that paid circulators were actually more likely to commit fraud" and held the State of Mississippi to the same burden as regards circulators paid on a per-signature basis. Id. Finding "no proof to support such a finding," the court invalidated the Mississippi statute. Id.

The factors the Court considers in determining whether to issue a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure are as follows:

> (1) whether the plaintiff has shown a likelihood that it will succeed on the merits of its claims;
>
> (2) whether the plaintiff will suffer irreparable harm if the temporary restraining order does not issue;

> (3) the probability that granting the temporary restraining order will cause substantial harm to third parties; and
>
> (4) whether the public interest is advanced by the issuance of the temporary restraining order.

See Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994) (6th Cir. 1993)). Those four considerations are "factors to be balanced, not prerequisites that must be met." In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985). The degree of likelihood of success on the merits required to support the issuance of a temporary restraining order may, therefore, depends on the strength of the other factors considered. See Washington, 35 F.3d at 1099 (citing DeLorean, supra).

The Court is persuaded that Plaintiffs' likelihood of success on the merits of their claim, under the First Amendment, that O.R.C. § 3599.111 impermissibly infringes upon their core political speech rights is very high. While the parties disagree as to the quality of proof that each must offer at this stage of these proceedings, the Court is persuaded that Plaintiffs' burden is to assert that the restriction on payment of petition circulators on a per-signature basis will "burden their ability to collect signatures." Initiative & Referendum Institute v. Jaeger, 241 F.3d 614, 618 (8th Cir. 2001). Plaintiffs may have been required to adduce actual evidence of such a burdening effect had the State introduced evidence in support of its supposition that payment on a per-signature basis causes, or increases the incidence of, fraud. See id. Absent such evidence from the State,

assertions that the restriction burdens core political speech are sufficient. See id.

In either case, Plaintiffs have satisfied their burden. They have introduced actual evidence that tends to show that the restriction on payment of petition circulators on a per-signature basis limits their ability to retain effective circulators and reduces the likelihood that they will succeed in placing their initiative on the November 2005 ballot. The State of Ohio, on the other hand, has failed to adduce evidence of the necessity of the statute to prevent fraud in the initiative process. While evidence identified by the State demonstrates that fraud has occurred in the context of circulation of petitions by circulators paid on a per-signature basis, it has not isolated the method of payment as the cause of, or an incentive to, the fraud.

In the Ralph Nader petition matter, circulators were not, apparently, paid on any basis other than per signature. Accordingly, the State is unable to rely upon evidence generated in the context of its investigation of that matter to prove that compensation on a per-signature basis generates fraud at a greater rate than other forms of compensation. Its argument to that effect is mere supposition and insufficient to defeat Plaintiffs' assertions in the opinions of all of the courts that have considered the matter, including the Eighth Circuit Court of Appeals, upon whose decision in Jaeger, supra, the State of Ohio relies primarily.

The harm to the Plaintiffs that would result from this Court's refusal to grant the requested temporary equitable relief is the impairment of a First Amendment right. Such an impairment, even

for a short period of time, is irreparable harm. See, e.g., Connection Distributing Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998) (citing Elrod v. Burns, 427 U.S. 347 (1976) (plurality); Newsom v. Norris, 888 F.2d 371, 378 (6th Cir. 1989)), cert. denied, 526 U.S. 1087 (1999). Thus, to the extent that Plaintiffs have established a likelihood of success on the merits of their First Amendment claim, they have also established the possibility of irreparable harm as a result of the impairment of their core political speech rights. See Connection Distributing, 154 F.3d at 288 (citing Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1490 (6th Cir. 1995), cert. denied, 517 U.S. 1135 (1996)).

The State has argued that any harm to Plaintiffs is merely economic, inasmuch as the collection of signatures on their initiative petitions may be more costly in light of the restriction embodied in O.R.C. § 3599.111. That argument ignores Plaintiffs' assertion that they are less likely to succeed in placing their initiative on the ballot if they are prohibited from paying circulators on a per-signature basis. The Supreme Court in Meyer concluded that a restriction on speech that "makes it less likely" that a petition drive will be successful burdens a right protected by the First Amendment. See Meyer, 486 U.S. at 423. The potential harm to Plaintiffs, therefore, is the loss or impairment of a Constitutional right, not merely an economic injury.

The State and the other Defendants have failed to identify a harm that will befall third parties in the event that the Court issues the requested temporary restraining order. The Court perceives none.

Finally, the preservation and defense of constitutional rights is always in the public interest. See, e.g., G & V Lounge, Inc. v. Michigan Liquor Control Commission, 23 F.3d 1071, 1079 (6th Cir. 1994) (citing Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383 (1979); Planned Parenthood Association v. Cincinnati, 822 F.2d 1390, 1400 (6th Cir. 1987)). The Court concludes, therefore, that each of the relevant factors favors the issuance of the requested temporary restraining order in this case.

For those reasons, the Court hereby **ENJOINS** the Defendants from enforcing O.R.C. § 3599.111 pending further order of this Court or the United States Court of Appeals. The Court will not require payment of bond. The Court will conduct a hearing on Plaintiffs' motion for a preliminary injunction on May 6, 2005, beginning at 9:00 a.m.

IT IS SO ORDERED.

s/Sandra S. Beckwith, Chief Judge
United States District Court